APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CIPRIANO D. ALONZO,
Defendant and Appellant,

v.

UNITED STATES OF AMERICA,
Plaintiff and Appellee.

No. 25,920

[March 9, 1971]

On Appeal from the United States District Court for the Northern District of California

Before: KOELSCH and TRASK, Circuit Judges, and BYRNE,* District Judge.

BYRNE, District Judge:

The appellant Alonzo, James Jackson and Dorothy Cox were indicted for violation of the federal narcotics laws. They were tried and convicted by a jury. Only Alonzo's conviction of the one count with which he was charged pursuant to § 174 Title 21 U.S.C., is relevant to this appeal.

* Honorable William M. Byrne, United States District Judge, Los Angeles, California, sitting by designation.

On September 18, 1968, George Heard, an undercover narcotics agent, met James Jackson at Jackson's residence and purchased an ounce of heroin for which he paid $400.00. A week later he made a similar purchase.

Heard telephoned Jackson at his apartment on October 2, 1968, and asked if he could get "six pieces". Jackson stated that "his man was out of town", but that he could supply Heard with a portion of the desired amount and he "would get the other later". Heard rejected this arrangement, stating that he wanted the entire amount at one time and that he would contact Jackson in a few days.

On October 4, 1968, Heard again called Jackson who told him his "man" was back, that he was on his way over and would be there by the time Heard arrived. When Heard arrived at Jackson's apartment, he was told by Jackson that his "man" would bring the drugs over, since he was a short distance away and that he could get him any amount. About 11:35 A.M. Jackson answered the phone and spoke to a man he identified as "Pete" and asked him to bring "the six pieces". Shortly thereafter appellant arrived at Jackson's apartment and was introduced to Heard as "Pete". "Pete" told Jackson that he had not brought "the six pieces" up to the apartment because "he didn't like the way it looked outside". At appellant's suggestion, the men decided to go to Alonzo's house and com-

plete the transaction there. Appellant and Jackson drove to the former's house together; Heard followed in his own car.

When the men arrived at Alonzo's house, they proceeded to the kitchen where appellant requested the "package" from Jackson who removed a brown bag from his coat pocket and handed it to appellant. Alonzo took a piece of newspaper and spread it out on the table, removed two rubber balloons from the brown bag and emptied the heroin from the balloons onto the newspaper. He then proceeded to mix the heroin with milk sugar, commenting that the heroin had never been cut before.

At this point, Heard left the room and telephoned the operator at the California Bureau of Narcotics Enforcement. Heard told the operator to make radio contact with agents who had placed Alonzo's house under surveillance and tell them that he "had the evidence inside" and that arrests should be made.

Approximately three minutes after making this telephone call, the agent "heard knocking and voices at the front of the house, and the officers entered and placed them both under arrest".

The first contention of error is that the entry into the premises and the seizure of the heroin was unlawful and therefore the introduction of the narcotics seized by the agents should have been suppressed.

California Agent Van Raam received the radio communication which had been instigated by Heard. Immediately after receiving this information Van Raam and the other officers congregated in front of appellant's house. As they had anticipated making the arrest at Jackson's home, they obviously did not have a warrant to search Alonzo's house.

The entry and the arrest were made by State narcotics officers and members of the San Francisco Police Department. Agent Elsberg knocked at the door while Officer Morrow of the San Francisco Police Department yelled "Police Officers, we are here on a narcotic raid." The door remained closed, and Morrow testified he heard running and barking dogs. He then ordered Elsberg to kick the door in. A period of 15 to 20 seconds had elapsed from Elsberg's initial knock.

Morrow testified that one of the factors which led to the decision to forcibly enter appellant's residence was his concern for Heard's safety. The officer attributed his concern to information given to him that Alonzo was Jackson's "source" and that "he was generally armed". His concern was also due to the barking of Alonzo's Doberman pinschers and the fact that Heard did not have any money on his person.

There can be no dispute as to the existence of probable cause for the making of the arrests. The only question relates to whether the arrests were lawfully executed. Heard was a federal narcotics agent, but the

arrest of Alonzo was made by a state officer who was authorized to make such arrest by Section 844 of the Penal Code of the State of California.[1]

This Penal Code Section was construed by the Supreme Court of the State of California in *People* v. *Maddox*, 46 Cal. 2d 301, 294 P.2d 6, *cert. den.* 352 U.S. 858 (1956). In that case, the arrest was made in a private dwelling without a warrant by a state officer who had reasonable grounds for believing that the narcotic laws were being violated. The officer sought entrance to the home by knocking. He then kicked open the door and arrested the defendant. The court stated:

> ". . . since the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose . . . We conclude therefore that when there is reasonable cause to make an arrest and search and the facts known to him before his entry are not inconsistent with a good faith belief on the part of the officer that compliance with section 844 is excused, his failure to comply with the formal requirements of that section

[1] California Penal Code Section 844 provides:
"To make an arrest, a private person, if the offense be a felony, and in all cases a peace-officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired."

> does not justify the exclusion of the evidence he obtains."

See also, *Williams* v. *United States*, 273 F.2d 781 (1959).

In the ordinary case, officers might be expected to wait more than 15 to 20 seconds after demanding admittance, but under the circumstances which existed here, including the perilous position of Agent Heard, it was of paramount importance that the entry be made as quickly as possible. The district court Judge properly denied the motion to suppress the evidence.

Appellant asserts that the trial court incorrectly instructed the jury regarding the presumption provided in 21 U.S.C. § 174.[2] According to Alonzo. "The instructions left the impression that once possession was proved beyond a reasonable doubt, conviction should follow." The carefully selected portion of the instruction the appellant has asked this court to consider does not accurately portray Judge Layton's instructions. Not only did the court preface its instruction relating to the statutory presumption by spelling out the requirements "in order to establish the offense", but it informed the jury that the presumption "does not change the fundamental rule that a defendant is presumed to be innocent until the government

[2] 21 U.S.C. § 174 provides the following presumption:

". . . Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

has met its burden of proving beyond a reasonable doubt every essential element of the offense charged against him". These instructions are virtually identical with those approved by this court in *United States* v. *Parker*, 428 F.2d 488 (CA 9, 1970).

Affirmed.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff*, v. JAMES E. JACKSON, CIPRIANO ALONZO, and DOROTHY COX, *Defendants.*	**Criminal No. 42342**

ORDER

AND NOW, to wit, this 3rd day of March, 1970, it appearing that the defendant, Cipriano Alonzo, has moved for an acquittal or in the alternative for a new trial on the grounds that:

(1) The statutory presumptions in 21 U.S.C. §174 are Constitutionally invalid;

(2) Evidence was introduced against the defendant which was seized in violation of the Fourth Amendment and 18 U.S.C. § 3109;

(3) The Court erred in its instructions to the jury on possession, the burden of proof, and on the inference which could be drawn from the possession of the narcotic drug;

AND this motion having been considered on briefs submitted by plaintiff and defendant;

AND it appearing that the United States Supreme Court has upheld the statutory presumptions of 21 U.S.C. § 174 in *Turner* v. *United States*, 396 U.S. 642, 38 U.S.L.W. 3101 (1970);

AND it appearing that, even assuming that 18 U.S.C. § 3109 were not complied with, there were "exigent circumstances" which would excuse any non-compliance, *Sabbeth* v. *United States*, 391 U.S. 585, 591 (1968); *Miller* v. *United States*, 357 U.S. 301, 309 (1958), in that:

(1) The agents had information that the defendant was armed;

(2) The agents had reasonable grounds to fear that the federal narcotics agent inside the defendant's house was in danger because he did not have sufficient money to purchase the heroin;

(3) The agents had made a previous investigation of the defendant and wished to arrest the defendant in possession of the narcotics;

(4) The agents had announced their presence and were reasonably afraid that this warning, combined with the barking of the defendant's dogs, might lead to the destruction of the heroin;

And it appearing that the instructions given to the jury were proper and not confusing,

IT IS ORDERED that the defendant's motion be and the same is herewith denied.

CALEB LAYTON III
U.S.D.J.